UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
UT VAN NGUYEN, and	)	
NHUNG CAMTHI LE,	)	CASE NO. 04-64932 JPK
	)	Chapter 7
Debtors.	)	
**********		
AMERICAN EXPRESS	)	
CENTURION BANK,	)	
Plaintiff,	)	
v.	)	ADVERSARY NO. 04-6243
UT VAN NGUYEN, and	)	
NHUNG CAMTHI LE,	)	
Defendants.	)	

JUDGMENT DETERMINING DISCHARGEABILITY OF INDEBTEDNESS

This adversary proceeding was commenced by a complaint[1] filed by the plaintiff American Express Centurion Bank ("American Express") against Ut Van Nguyen ("Nguyen") and Nhung Camthi Le ("Le"), collectively defendants or debtors ("Defendants" or "Debtors") on December 27, 2004. Defendants are the debtors in a Chapter 7 case filed under case number 04-64932 in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division. The record establishes that a copy of both the summons and complaint was served upon Ut Van Nguyen, Nhung Camthi Le, and upon their Chapter 7 counsel Rosalind G. Parr, as evidenced by the return of service of process filed on January 10, 2005. The record also establishes that no appearance has been filed on behalf of the Defendants, and that the Defendants have not filed an answer or other response to the complaint.

The Plaintiff's Motion for Entry of Default Judgment was filed on February 28, 2005. Accompanying the Plaintiff's Motion for Entry of Default Judgment is an Affidavit of Karl T. Ryan in Support of Plaintiff's Motion for Entry of Default Judgment, an Affidavit of Plaintiff in Support

[1] Attached to the complaint are monthly account statements issued by American Express to the Defendants. Said adoption by reference is permitted by Fed.R.Civ.P. 10(c) /Fed.R.Bankr.P. 7010.

of its Request for Entry of Default Judgment with exhibits. Entry of default was made by the Clerk of the Court on March 8, 2005 and an Affidavit of Nonmilitary Service was filed on April 13, 2005. The case is now before the Court for review of the motion for default judgment.

American Express asserts that Defendants' debt to it is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A).

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and N.D.Ind.L.R. 200.1. This adversary proceeding is a "core proceeding" as defined by 28 U.S.C. § 157(b)(2)(I), and thus this Court has jurisdiction to enter a final judgment on the complaint.

I. Standards for Review of Motions for Default Judgment

The basic procedural provision with respect to judgment by default is provided by Fed.R.Civ.P. 55(b)(2), made applicable to adversary proceedings by Fed.R.Bankr.P. 7055. That provision in pertinent part states:

> (b) Judgment. Judgment by default may be entered as follows:
> . . .
> (2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor: . . . If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper . . .

The fact that a plaintiff is entitled to an entry of default does not entitle the plaintiff to the entry of judgment by default. As explained in *In re Sanchez*, 277 B.R. 904, 907 (Bankr. N.D.Ill. 2002):

> Rule 7055(b)(2) Fed.R.Bankr.P. governs default judgments entered by a bankruptcy court. A movant is not entitled to default judgment as a matter of right even though the debtor is in default under Rule 55(a) [Fed.R.Bankr.P. 7055(a)]. *Lewis v. Lynn*, 236

> F.3d 766, 767 (5th Cir. 2001). Panels in this Circuit have eschewed traditional notions disfavoring default judgments. *Stafford v. Mesnik*, 63 F.3d 1445, 1450 (7th Cir.1995); *Profile Gear Corp. v. Foundry Allied Industries, Inc.*, 937 F.2d 351, 354 (7th Cir.1991); *Matter of State Exchange Finance Co.*, 896 F.2d 1104, 1106 (7th Cir.1990). However, in the bankruptcy context, where a debtor has a presumptive right to a discharge, default judgment motions should not be granted unless the movant shows that its debt is nondischargeable as a matter of law. *Valley Oak Credit Union v. Villegas*, 132 B.R. 742, 746 (9th Cir. BAP 1991) (court must determine whether plaintiff is entitled to judgment); *In re McArthur*, 258 B.R. 741, 746 (Bankr. W.D.Ark. 2001) (noting that bankruptcy courts have taken a conservative approach and sometimes refrain from granting default judgment motions which deprive debtor of discharge).
>
> Thus, the issue here is whether Plaintiff has shown at least *prima facie* facts meeting the legal requirements to except a debt from discharge under § 523(a)(2)(A).

As explained by the Bankruptcy Appellate Panel of the Ninth Circuit in *Valley Oak Credit Union v. Villegas*, 132 B.R. 742, 746 (9th Cir. BAP 1991):

> The court has wide discretion in determining whether to enter a default judgment under Rule 55. See generally 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure Civil 2d § 2685 (1983). Similarly, a trial court has broad discretion as to the nature of the hearing that it will hold pursuant to Rule 55(b)(2) in determining whether to enter a default judgment. This language of the rule itself confirms the discretion of the trial court to hold such hearings "as it deems necessary and proper." Fed.R.Civ.P. 55(b). This provides the trial court with discretion to require, at a hearing under Rule 55(b)(2), some proof of the facts that are necessary to a valid cause of action or to determine liability. See *Peerless Industries, Inc. v. Herrin Illinois Café, Inc.*, 593 F.Supp. 1339, 1341 (E.D.Mo.1984), *aff'd without opinion* 774 F.2d 1172 (8th Cir.1985); Wright, Miller and Kane, at § 2688.

Because of the impact of a nondischargeability action on the “fresh start” arising from the entry of an order of discharge pursuant to 11 U.S.C. § 727(a), bankruptcy courts are particularly reluctant to “rubber stamp” motions for default judgments in adversary proceedings filed to determine dischargeability of indebtedness, particularly in circumstances where averments of

the complaint are largely conclusory; *In re Sziel*, 206 B.R. 490, 492-93 (Bankr. N.D.Ill. 1997).

In establishing the basic facts of record upon which the Court is to review a motion for default judgment, the United States Court of Appeals for the Seventh Circuit follows the rule that "upon default, the well-pleaded allegations of a complaint relating to liability are taken as true, [but] allegations in a complaint relating to the amount of damages suffered ordinarily are not," *US v. Di Mucci*, 879 F.2d 1488, 1497 (7th Cir. 1989); *Dundee Cement Company v. Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983); *Merrill Lynch Mortgage Corp. v. Narayan*, 908 F.2d 246, 253 (7th Cir. 1990).

II. Status of the Record

Defendants filed their Chapter 7 case on September 30, 2004, which the Trustee determined to be a no asset case. On December 27, 2004, American Express filed its complaint, alleging that the debtors falsely represented that they intended to repay the charge accounts with which they purchased goods and obtained cash advances. The creditor requested that the credit card debts be found nondischargeable under § 523(a)(2)(A).[2] The Court's order discharging the debtors was issued on March 10, 2005.

American Express' complaint seeks an order of the Court finding that all charges incurred by Nguyen and Le on their three (3) accounts maintained with American Express be excepted from discharge. The details of each account are provided to the Court in the form of exhibits; "A", "B", and "C", along with the Affidavit of Plaintiff in Support of its Request for Entry of Default Judgment. Accepted as true under the well pleaded complaint rule, paragraph 4 of the complaint establishes that Nguyen opened an account with American Express in January 2004. ("Account I"). The terms and conditions of the Account I agreement require that full

[2] The presumption of nondischargeability under § 523(a)(2)(c) is not applicable because the charges were not made on the creditor's account within sixty days prior to bankruptcy, as that subsection requires.

payment be made upon the receipt of a monthly billing statement. [Complaint ¶ 23]. Exhibit "A" is composed of monthly billing statements as they relate to Account I. That document establishes that between June 8, 2004 and June 9, 2004, Nguyen accumulated $21,104.99 in retail charges. All charges were incurred during a period beginning 114, and ending 113, days prior to the initiation of Nguyen's bankruptcy. No payments have been made on this account. [Plaintiff's Affidavit,¶ 23]. As a result of the nonpayment, Account I accrued late payment fees totaling $1,271.67. [*Id*. ¶ 24]. Thus, the balance of account one as of the date of Nguyen's bankruptcy petition was $22.376.66. [Ex. "A"].

Account II ("Account II") was opened by Le in August, 2003. [Complaint ¶ 8]. Unlike Account I, Account II had a credit limit of $5000.00 with minimum monthly payments being due. [Ex. "B"]. Exhibit "B" composed of monthly billing statements as they relate to Account II establishes that between June 11, 2004 and June 24, 2004, Le accumulated $5,154.81 in charges. All charges were incurred during a period beginning 111, and ending 98, days prior to the initiation of Le's bankruptcy. No payments have been made on this account. [Plaintiff's Affidavit, ¶ 32]. As a result of non payment, Account II accrued late payment fees, finance charges, and overlimit fees totaling $496.34. [*Id.* ¶ 33]. The balance on the account as of the date of Le's bankruptcy petition was $5,651.15. [Ex. "B"].

Account III ("Account III") was opened by Nguyen in January 2004. [Complaint ¶ 15]. Being similar to Le's Account II, Account III had a credit limit of $2,000.00 with minimum monthly payments being due. [Ex. "C"]. Exhibit "C" composed of monthly billing statements as they relate to Account III establishes that between June 10, 2004 and June 26, 2004, Nguyen accumulated $1,586.68 in charges.[3] All charges were incurred during a period beginning 112,

[3] In paragraph 59 of the Plaintiff's complaint the Plaintiff states that Nguyen accumulated $1,583.68 in retail charges between June 10 and June 28 of 2004. A review of Exhibit "C" illustrates that the sum of $1,58**6**.68 was incurred. In addition, the charges were not incurred between June 10 and June

and ending 96, days prior to the initiation of Nguyen's bankruptcy. On June 19, 2004, Nguyen made one payment of $23.00 on charges incurred prior to June 10, 2004, however, this payment was made on charges which are not subject to this nondischargeability proceeding [Ex. "C"]. The balance on Account III as of the date of Nguyen's bankruptcy petition was $2,999.03[4]. *Id.*

The debtors' Statement of Financial Affairs states that their income in 2003, the year prior the filing of the chapter 7 petition, was $7,356.00, and that their income in 2004, the year their bankruptcy petition was filed, was $6,583. In 2002, their income was $14,382.00. In addition, the debtors' Statement of Financial Affairs shows gambling losses incurred between January 2003 and August 2004 in the amount of $180,000.00.

On Schedule J, debtors stated that their current monthly expenditures included a rent or home mortgage payment of $491.00; a payment for utilities of $100.00; expenditures for food of $300.00; in addition to expenditures for telephone, cable, maintenance, laundry, medical, recreation and newspaper totaling $350.00. The debtors' total monthly expenses are $1,241.00. From information contained in the schedules, and the lack of information that would indicate to the Court to the contrary, it is to be assumed that the debtors had the same or similar expenses three to four months earlier, at the time during which they incurred their debt to American Express. More importantly, Schedule F of the debtors' schedules establishes that credit card debt constituted 100% of their total debt on the date of the filing of the petition. Although this figure is based on debtors' schedules filed not less than 96 days after the last charge was incurred, the Court infers that a substantial amount of the $183,829,00 in credit

---

28 of 2004, but instead between June 10 and June 2**6** of 2004.

[4] In paragraph 13 of its Complaint plaintiff states that the balance on Account 3 as of the date of the filing of the Chapter 7 petition was $3,034.03. A review of the monthly billing statements embodied in Exhibit "C" shows that a late payment fee of $35.00 was incurred on October 4, 2004, thus post-petition.

card debt stated in Schedule F, if not all of it, was due and owing between June 8, 2004 and June 26, 2004, the time of the accrual of the American Express debt.

III. Legal Analysis

The issue in this case is whether debtors' obligation to American Express is excepted from her discharge under § 523(a)(2)(A) of the Bankruptcy Code. That section provides that an individual debtor is not discharged from any debt –

> (2) for money, property, services, or extension, renewal or refinancing of credit, to the extent obtained by –
>
> (A) false pretenses, false representation, or actual fraud. . . .[5]

---

[5] As stated in *Shiel v. AT&T Universal Card Services, Corp.*, 206 B.R. 490, 493 (Bankr. N.D.Ill. 1997), this sub-section is not well-suited to credit card debts, but unless the charges come under § 523(a)(2)(C), and due to the lack of any special credit card exception to discharge, it is the only discharge exception generally available to challenge credit card debts. The same can be said for actions based upon "bad" checks, i.e., checks simultaneously exchanged for the acquisition of goods or services: § 523(a)(2)(A) provides essentially the sole ground for nondischargeability.

11 U.S.C. § 523(a) provides no clear mechanism for precluding the dischargeability of several forms of what is in essence theft by deception. Primary among these are the obtaining of services, property or credit by means of a form of promise which the promissor has no intention of honoring at the time the promise is made, in the absence of which the promissee, not aware of the promissor's guile, would not have provided the property, service or credit to the promissor. Many adversary proceedings in this genre pursue nondischargeability based on alleged fraudulent use of a credit card or the issuance of a "bad" check. Other cases assert nondischargeability based upon the alleged fraudulent intent of the promise itself, without the intermediary mechanism of a swiped credit card or of a given check, in essence contending that what may appear to be simply a contractual breach is in actuality a fraudulent artifice because at the time of entering into the contract the promissor never intended to honor his/her obligations under the contract.

The most common approach to seek nondischargeability of these forms of theft by deception is to pursue an action under 11 U.S.C. § 523(a)(2)(A). This is as it should be. This form of fraudulent conduct clearly doesn't fall within the ambit of 11 U.S.C. § 523(a)(4), requiring as that section does that the conduct arise in a fiduciary capacity, or involve embezzlement or larceny. Some actions attempt to fit the fraudulent conduct into 11 U.S.C. § 523(a)(6), a very difficult proposition unless the concept of "property" in that section is expanded to include the right to receive payment for the goods or services provided or the credit extended. This is simply too much of a stretch: § 523(a)(6) was meant to deal with more corporeal torts, actions which affect a body or a tangible thing, or a pecuniary relationship. A "willful and malicious injury" connotes an act of aggression, not an act of deception. The simple failure to pay for something obtained from another – the failure to keep a promise to pay – even if the failure was intended from the start, does not give rise to the form of injury intended by Congress to be brought within the ambit of § 523(a)(6). This conclusion is more than buttressed by the legislative intent evidenced by the enactment of 11 U.S.C. § 523(a)(2)(c), which provides a presumption of nondischargeability for the obtaining of certain types of goods, services and extensions of credit by the use of a mere promise to pay for them. This Court deems this insertion by Congress of a form of theft by deception into § 523(a)(2) to conclusively evidence that this form of tortious conduct – obtaining of property, services or an extension of

Although the precise formulation and specification of the number of elements varies from decision to decision, in order to sustain a *prima facie* case of fraud under § 523(a)(2)(A), courts have traditionally required a creditor to establish that: (1) the debtor made a representation to the creditor; (2) at the time of the representation, the debtor knew it to be false or the representation was made with such reckless disregard for the truth as to constitute willful misrepresentation; (3) the debtor made the representation with the intent and purpose of deceiving the creditor; (4) the creditor relied on the representation resulting in a loss to the creditor; and (5) the creditor's reliance was justifiable;[6] *In re Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995)*; Mayer v. Spanel Int'l, Ltd. (In re Mayer)*, 51 F.3d 670, 673, 676 (7th Cir.), *cert. denied*, 516 U.S. 1008 (1995); *In re Maurice*, 21 F.3d 767, 774 (7th Cir. 1994). The creditor must prove each element by a preponderance of the evidence. *Grogan v. Garner,* 498 U.S. 279, 291, 111 S.Ct. 654, 661 (1991)*; In re Bero*, 110 F.3d 462, 465 (7th Cir. 1997). Finally, "exceptions to discharge are to be construed strictly against a creditor and in favor of the debtor." *In re Scarlata,* 979 F.2d 521, 524 (7th Cir. 1992), reh. en banc den. 1993*; In re Zarzynski,* 771 F.2d 304, 306 (7th Cir. 1985).

Under the foregoing standards, the Court deems that a representation is made by the

---

credit by a fraudulently made promise to pay for the item obtained – is covered exclusively by 11 U.S.C. § 523(a)(2)(A), or it escapes the net of nondischargeability entirely.

As explained by the Seventh Circuit Court of Appeals in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), § 523(a)(2)(A) has three *distinct* forms of conduct which can lead to nondischargeability: false pretenses, false representation, or actual fraud. A representation is not necessary if actual fraud can be established; because actual fraud is broader than misrepresentation, it can be defined as "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another." *McClellan*, 217 F.3d at 893 citing 4 *Collier on Bankruptcy* ¶ 523.08[1][e], o. 523-45 (15th ed., Lawrence P. King Ed., 2000). As this Court construes §523(a)(2)(A), most garden variety credit card and bad check cases will rise or fall under the " false representation" portion of the statute. There may be cases, however, in which a plaintiff with this type of case may not be able to establish a false representation but can still establish actual fraud: the deviations of the human mind are myriad and clever, and the circumstances of each case can only be judged against the applicable legal standards.

[6] In *Field v. Mans*, 516 U.S. 59, 70, 116 S.Ct. 437, 446, 133 L.Ed.2d 351 (1995), the Supreme Court held that a creditor's reliance need only be justifiable, not reasonable.

user of a credit card each time the card is used to obtain an advance of credit or a cash advance. Similarly, a representation is made when a check is given in simultaneous exchange for the acquisition of goods or a service. The use of the credit card or the delivery of the check constitutes a promise to pay: *In re Murphy*, 190 B.R. 327 (Bankr. N.D.Ill. 1995); *In re Faulk*, 69 B.R. 743, 755 (Bankr. N.D.Ind. 1986) ["the use of the credit card is a statement of a present intention to pay at the time of purchase rather than an unwritten representation of the ability to pay or financial condition"]. As stated by Chief Judge Harry C. Dees, Jr. in *Citibank (South Dakota), NA v. Ziegert*, Proc. No. 03-3090, at pg. 6 (Bankr. N.D.Ind. August 3, 2004) [unpublished decision]:

> (S)ome courts adhere to the position that "whenever a credit holder uses a credit card, he impliedly represents that he has the ability and the intention to pay for the charges incurred. The most comprehensive analysis of this matter has been presented by the Fifth Circuit Court of Appeals in *AT&T v. Mercer (In re Mercer)*, 246 F.3d 391 (5th Cir. 2001) (en bank), which reversed the bankruptcy court's post-trial finding that the credit card debt was dischargeable . . . [t]he majority held that, for each use of the credit card, as a matter of law, the debtor 'represented her intent to pay the loan; *if her representation was knowingly false*, she intended to deceive [the creditor]; it actually relied on the representation by authorizing the requested loan; and its loss was proximately caused by such reliance.' "

The representation is that the cardholder will pay for the advance of credit/cash advance according to the terms of his/her contract with the card issuer, or that when presented for payment, the check will be honored. But the use of the card/the delivery of the check is nothing more than this promise: it is not a representation that *at the time of use or delivery,* the user/payor has the then-present ability to pay when the card statement arrives or the check is presented. This holding is in conformity with, and is compelled by, the cases of *Williams v. United States*, 458 U.S. 279, 102 S.Ct. 3088 (1982) and *In re Scarlata*, 979 F.2d 521, 525 (7th Cir. 1993). *Williams* involved a criminal statute [18 U.S.C. § 1014] and determined that

knowingly passing a bad check is not a "false statement", as required for conviction under that statute. The Court reasoned that "a check is not a factual assertion at all"; a check "serve[s] only to direct the drawee bank to pay the face amounts to the bearer . . .". *Williams*, 458 U.S. at 284. The *Scarlata* court found no difference between the construction of the criminal statute in *Williams* and the construction of 11 U.S.C. § 523(a)(2)(A) in the context of the element of "false pretense" in the passing of a bad check, and thus held that a 'creditor cannot rely solely on the existence of an NSF check . . . to establish a misrepresentation for § 523(a)(2) purposes' " [citing *In re Hunt*, 30 B.R. 425, 438 (M.D. Tenn. 1983)]; *Scarlata,* 979 F.2d at 525. Thus, the fact of nonpayment of a credit card statement or of dishonor of a check is not evidence of scienter, i.e., the knowledge and intent of the user/drawer, *at the time of use or delivery,* that payment will not be made for whatever was acquired by the use of the card or delivery of the check. Thus, the presentment of a credit card for charge, or the delivery of a check in payment, is not a factual assertion that the presenter/deliverer has the present ability to repay the debt: those acts constitute only a promise to repay a debt in the future.

What then is the type of conduct evidenced by the delivery of a “bad” check, the failure to pay a credit card statement, or the failure to honor a contractual promise to pay which § 523(a)(2)(A) is intended to cover? It is the most egregious of conduct, an intent from the inception of the transactional relationship to obtain something of value and to never pay for it. The intent to commit theft, if you will, must exist at the inception of each transaction with the creditor. An intervening event which inhibits or even precludes the promissor’s ability to pay, absent the promissor's intent not to pay from the inception of the transactional relationship with the promissee, will not give rise to a nondischargeable debt.

The mere fact that the promissee subsequently failed to make good on his promise has no probative value in establishing the necessary element of scienter, which under the five-

element test stated on page 7 requires both knowledge of the falsity of, or reckless disregard for, the truth of the promise, and the intent that the promissee would part with a good, a service or an extension of credit based upon the promise known to be false, or recklessly made. In nearly all cases, establishing the knowledge/reckless disregard element (element 2 on page 8) will establish the intent element (element 3 on page 8). But perhaps not always. When asked by a literary critic to explain the basis of the sometimes incredible circumstantial plot elements of his novels, the great Russian writer Fyodor Dostoevsky responded that he collected newspaper clippings reporting odd human behaviors, and that he could never duplicate in fiction the sometimes extreme manifestations of actual human conduct or thought. While knowledge of falsity /reckless disregard of truth, and intent to deceive, are usually hand-in-glove due to the circumstantial convolutions of the human mind, there may be instances in which these elements do not coalesce. In a default context, a *prima facie* case of knowledge/reckless disregard will in this Court's view, *ipso facto* establish intent to deceive. However, in a non-default context, that may not be true depending on the evidence submitted by the debtor/defendant. Very few smoking guns, or even smoking witnesses, are found by the discovery of a bar confidant to whom the debtor confided that he used his credit card to get his plasma TV and the sucker credit card issuer never knew he was never going to pay a dime to it. Because most creditors have no smoking bar mate to offer as a witness, establishing this element will almost always require the extensive use of circumstantial evidence: evidence which can lead to the conclusion that the promissee never intended to pay, or had no objective ability to pay, as he had promised. In the context of theft by deception, reliance by the promissor is almost a presumption, unless the debtor can offer proof to the contrary: in the realm of the real world, absent a gift or devise, hardly anyone ever parts with a thing of value for which he has been promised payment without expecting payment. Damage arises from the fact that the promise

has been breached: the damage is the value ascribed to the good, service, or credit extension for which payment has not been received.

The element of scienter is most difficult to establish in a default context. Be that as it may, the burden of proof required of a creditor to sort out a "bad actor" from a mere contract breachor doesn't change. Fed.R.Bankr.P. 9011 states that the filing of a complaint is a representation/certification that the claims asserted "are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and a representation/certification that the claims asserted "have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Likewise, the filing of a motion for judgment by default constitutes the movant's certification that the plaintiff can at that time present admissible evidence that establishes a *prima facie* case of nondischargeability. Developing a *prima facie* case of circumstantial scienter prior to the filing of an adversary proceeding can be undertaken in many ways: analysis of the Schedules and Statement of Affairs in the debtor's main case; examination of the debtor at the § 341 meeting; a Rule 2004 examination, coupled with a motion to extend the time for filing an adversary complaint pursuant to Fed.R.Bankr.P. 4007(c). After the complaint is filed, all of the discovery devices of Part VII of the Federal Rules of Bankruptcy Procedure are available to the creditor to develop its case, whether or not the debtor ever appears or answers in response to the complaint.

What evidence will be probative to establish a *prima facie* case? In the circumstance of a credit card case, it is evidence that the debtor – based on his/her income, fixed expenses and debt structure at the time of the obtaining of a credit advance – either could not possibly have made even the minimum payments on the card while keeping current with other obligations, or should have reasonably known that he/she could not do so. Bunched credit transactions, or

multiple unpaid transactions with several or more creditors, shortly before the filing of the case may be probative of intent when coupled with "financial feasibility" evidence. In the circumstance of a check, evidence of the manner of the debtor's handling of the account on which the check was drawn is sometimes illuminating, again coupled with "financial feasibility" evidence. In the context of a dishonored check, Indiana law is instructive, although not binding on this Court. I.C. 26-2-7-3, et seq. provides penalties upon the drawer for the knowing nonpayment of a check by the drawee. The trigger for these penalties is the provision of written notice of dishonor by the payee to the drawer **by certified mail** [I.C. 26-2-7-6(b); *See*, I.C. 26-2-7-8] coupled with the drawer's failure to respond or to pay the amount of the check within a stated period of time.[7] In the Court's view, this form of notification coupled with the complete failure of the debtor to respond either by any payment or any communication, has some probative value with respect to intent. However, again, the mere fact that a check is not paid when presented will not *prima facie* establish the scienter element.[8]

The bottom line is that the defendant must have made the representation of the promise to pay with the intent and purpose of deceiving the creditor; i.e., intentional/actual fraud. As eloquently stated by the Honorable Kent Lindquist:

> This finding of fact as to intention will obviously have to be determined by circumstantial evidence in most cases as direct evidence of the Defendant's state of mind at the time of purchase is seldom expressly indicated. Although this is certainly a difficult task, it is no greater a task than any other cause of action that includes intent or state of mind as a

---

[7] The provision that dishonor of a check constitutes *prima facie* evidence that the drawer knew that a check would be dishonored, as stated in I.C. 35-43-5-5(c), is inconsistent with this Court's interpretation of 11 U.S.C. § 523(a)(2)(A).

[8] There are all kinds of reasons why a check is dishonored upon presentment, and many of them have nothing to do with fraudulent intent: math errors, garnishments, set-offs by the bank, freezes imposed on accounts, dishonoring or late payment of checks deposited into the account to cover the checks written on the account, or even the assumption of the receipt of funds which were not received due to no fault of the account holder – to name a few. The same can be said for a failure to pay current credit card statements, given that most people pay their bills from a demand deposit account.

> necessary element. And the existence of fraud may be inferred if the totality of the circumstances present a picture of deceptive conduct by the Debtor which indicates he intended to deceive or cheat the creditor. *In re Fenninger*, 49 B.R. 307, 310, *supra*; *In re Taylor*, 49 B.R. 849, 851, *supra*. The Court may logically infer this intent not to pay from the relevant facts surrounding each particular case. *See, In re Kimzey*, 761 F.2d 421, 424, supra. And a person's intent, his state of mind, has been long recognized as capable of ascertainment and a statement of present intention is deemed a statement of a material existing fact sufficient to support a fraud action. *In re Pannell*, 27 B.R. 298, 302 (Bankr.E.D.N.Y.1983).

In re Faulk, 69 B.R. 743, 755 (Bankr. N.D.Ind. 1986).

Courts must consider objective evidence that is probative of the debtor's intent to repay in addition to considering the debtor's demeanor (in a case determined by trial), but the ultimate inquiry still seeks to determine the debtor's subjective intent. *Citibank (South Dakota), N.A. v. Michel*, 220 B.R. 603, 606 (N.D.Ill. 1998), *In re Faulk*, 69 B.R. 743, (Bankr. N.D.Ind. 1986). In determining whether debts were incurred with no intention to repay them, many courts look at the totality of circumstances. A non-exclusive list of factors has been promulgated by various courts to aid in the determination of debtor's intention to deceit. Those factors are:

1. The length of time between the charges made and the filing of bankruptcy;

2. Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;

3. The number of charges made;

4. The amount of the charges;

5. The financial condition of the debtor at the time the charges are made;

6. Whether the charges were above the credit limit of the account;

7. Whether the debtor made multiple charges on the same day;

8. Whether or not the debtor was employed;

9. The debtor's prospects for employment;

10. The financial sophistication of the debtor;

11. Whether there was a sudden change in the debtor's buying habits; and

12. Whether the purchases were made for luxuries or necessities.

Michel, 220 B.R. at 606, *Faulk*, 69 B.R. at 757. *See also Sears, Roebuck & Co. v. Green (In re Green)*, 296 B.R. 173, 180 (Bankr. C.D.Ill. 2003)(evaluating debtor's intent by considering factors to determine whether "it is more probable than not that the debtor had the requisite fraudulent intent"); *In re Jacobs*, 196 B.R. 429, 434 (Bankr. N.D.Ind. 1996) ("a determination of whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent"). The *Jacobs* court found that the eight cash advances taken by the debtors in the six months prior to bankruptcy were used to make purchases of in excess of $6,000.00. Because the debtors knew or should have known that they could not pay for those charges, the court found that the debtors "perpetrated a fraud upon" the creditor. *Id*. at 434.

Now, turning to the facts in this case as presented on the record, the Court concludes that the totality of circumstances establishes that each debtor falsely represented that he/she would pay American Express, and that each intended to deceive the creditor when a credit card was used. The debtors' Schedules state $0.00 in secured debt, but $183,829.00 in unsecured debt, all of which is credit card debt. Schedule I states Le's monthly take home pay of $880.75 and Nguyen as having no income, while Schedule J states monthly expenses of $1,241.00, the difference being a negative monthly balance of $360.25.

The Statement of Financial Affairs shows that the debtors made $6,583.00 year-to-date in the petition year, in which year the following American Express charges were incurred:

Nguyen - Account I	Le - Account II	Nguyen - Account III

Merchant	Amount	Merchant	Amount	Merchant	Amount
Griegers Motor Sales	$20.250.00	Cash Advance	$401.75 + $12.05 Fee	Barnes & Noble	$3.98
America's Great Tire	$19.97	Cash Advance	$401.75 + $12.05 Fee	Burger King	$3.82
Circuit City	$835.02	Cash Advance	$201.75 + $6.05 Fee	K*B Toys	$6.35
		Famous - Barr	$68.90	K*B Toys	$30.70
		Kohls	$13.76	Speedway	$25.08
		Fifth Third Bank - balance transfer	$3,800.00	K*B Toys	$9.53
		Marathon	$23.29	Patz's Supervalu	$3.38
		Family Express	$100.00	The Disney Store	$18.00
		Costco	$113.46.	CVS Store	$17.48
				Best Buy	$1,362.92
				TOYS 'R' US	$31.79
				Gregors Motors Sales	$54.06
				Cinnabon	$2.25
				Meijers	$17.34

TOTAL	**$21.104.99**	**TOTAL**	**$5,154.81**	**TOTAL**	**$1,586.68**[9]

Total debt to American Express of both debtors	**$27,846.48.**

In 2003 – the year prior to the American Express charges – the debtors made a total of

[9] The "Total" amounts listed do not include late payment charges, overlimit charges or finance charges.

$7,384.00. Schedule F discloses $183,829.00 in credit card debt, and it is interesting to note that the debtors lacks any asset that would normally be realized from extensions of credit totaling $183,829.00. Schedule B states that on the petition date they had $120.00 worth of household goods & furniture, $100.00 worth of clothing, $20.00 in cash, and $150.00 in bank accounts. Schedules A and D state that they did not own any real estate, and that they have no secured creditors; consequently, debtors incredibly extensive incursions of credit card debt cannot be explained by the use of credit from one creditor to "save the house" or to "save the car" subject to secured debts of other creditors. In summary, 100% of the debtors' debt is comprised of credit card debt. The foregoing facts clearly establish that at the time each debtor incurred his/her indebtedness to American Express, each had no ability to repay it, a fact which each either knew or recklessly disregarded when the American Express debt was incurred. The record establishes in this case that both debtors intended to deceive American Express.

The debtors made no attempts to repay their debt to American Express.

Based on the totality of circumstances established by the record, the Court finds that American Express has established a *prima facie* case that each of the debtors had no present intention to pay for the extensions of credit each obtained from American Express, that each intended to deceive American Express by a promise effected by the use of a credit card, and that the extensions of credit were therefore obtained by each by false representations under the criteria of 11 U.S.C. § 523(a)(2)(A).

IT IS ORDERED, ADJUDGED AND DECREED that American Express' motion for default judgment is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that UT Van Nguyen's debt to American Express in the sum of **$22,688.67** is excepted from his discharge pursuant to § 523(a)(2)(A)**.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Nhung Camthi Le's debt to American Express in the sum of $5,154.81is excepted from her discharge pursuant to § 523(a)(2)(A)**.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that American Express is not entitled to the recovery of attorney's fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that American Express is not entitled to the recovery of interest.[10]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that American Express is entitled to recover its costs joint and severally from each defendant, in the amount of $150.00.[11]

Dated at Hammond, Indiana on April 22, 2005.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorneys of Record

[10] I.C. 34-51-4-1 provides that the chapter applies to "any civil action arising out of tortious conduct." Actions under 11 U.S.C. §523(a)(2)(A) are premised on the tort of fraud, not on civil contract theories, and thus I.C. 34-51-4-1 applies to this action: See, *Cohen V. De La Cruz*, 523 U.S. 213 (1998). The accrual date for American Express' action under I.C. 34-51-4-8 is deemed by the Court to be the later of 15 months after the last charge made by Le and Nguyen (June 24, 2004 and June 26, 2004 respectively;) or 6 months after the filing of the complaint (September 30, 2004). Under either scenario, American Express is not entitled to interest.

[11] This judgment determines the extent to which Nguyen's and Le's debt to American Express is excepted from discharge under 11 U.S.C. §523(a)(2)(A), but this is not a monetary judgment of this Court. American Express is free to pursue collection of its nondischargeable debt in a court other than this one.